United States Court of Appeals

for the Second Circuit

REPLY BRIEF

76-2099

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LEONARD SHELTON,

Petitioner-Appellant,

-against-

LARRY TAYLOR, Warden, Metropolitan Correctional Center; and MAURICE SIGLER, Chairman, U.S. Parole Commission,

Respondents-Appellees.

Docket No. 76-2099

REPLY BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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I

The Government relies on Moody v. Daggett, 97 Sup.Ct. 274 (1976), to argue that the dispositional options available to the Parole Commission under statutes and regulations effective on May 15, 1976, were also available to the old Parole Board, that appellant is therefore deprived of no liberty interest, and that consequently Moody controls this case. The response

simply is that the Government misreads Moody and that the new statutes and regulations, which will be applicable to Moody's hearing, provide substantially different dispositional powers than those available to the old Parole Board which conducted Shepard's hearing.

What the Supreme Court said in Moody is that the Parole Commission and Reorganization Act incorporates and codifies some of the Board's revocation practices. 97 Sup.Ct. at 276. The opinion does not say that the dispositional options of the Board and the Commission are identical. Indeed, contrary to the Government's position, the Supreme Court's opinion implicitly shows the distinctions between the dispositional powers of the old Board and the new Commission by the way the Court outlines those powers.

The Court states that during the period of the intervening sentence, the old Board could revoke and execute the warrant, causing the time on the original sentence to start to run from that moment; or the Board could dismiss the warrant and the parolee would get credit for all time from the date of his release; or the Board could wait until the end of the term of custody. The Court significantly does not state what the dispositional options would have been if the Board took no action until the end of the term in custody.

On the other hand, in outlining the options of the new Commission, the Court describes the options available when the Commission reserves its action until the end of the intervening

sentence: dismissal of the warrant, no revocation, or, "if revocation is chosen, the Commission has the power to grant, retroactively, the equivalent of concurrent sentences...." 97 Sup.Ct. at 279. It is only when referring to the Commission that the Court refers to retroactive concurrency if parole is revoked.*

Since Moody was to have his revocation hearing after May 15, 1976, the effective date of the new statute, the Court properly discussed only the dispositional options available to the new Commission which would hold that hearing. The options of the Commission, which include retroactive concurrency even when parole is revoked, cured any prejudice to liberty interests that might result from the institutional review procedures that took place prior to the end of the intervening sentence.

However, in this case, appellant's hearing was held with the prior, more limited, options. The Supreme Court never states or implies that the Board could revoke at the end of the term and give retroactive concurrency. Indeed, as explained in the main brief, the Board could not do so.** The Government's brief confuses the power of the old Board to withdraw the warrant with resulting full sentence credit and the power of the

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*The Government's partial quotation is disingenuous, since the opinion at 276-277, 276 nn.5 and 6, is about the Board, and not about the Commission.

**The Government's Brief at 12 makes a distinction between the applicability of the new statute and the fact that appellant's hearing occurred before the effective date of the new statute. They are, however, the same coin.

new Commission to revoke and nonetheless give concurrent sentences retroactively.

Moody holds that the new period of confinement is due to the new conviction, and is therefore not caused by the parole warrant and detainer. However, since liberty includes freedom from bodily restraint (Board of Regents v. Roth, 408 U.S. 564, 573 (1972)), what Moody implies by reference to the Commission's power to give retroactive sentence credit if the hearing is delayed is that the liberty interest is not prejudiced because the Commission has the power to reduce the length of time the parolee is restrained by full custody or parole. Conversely, because the Board could not affect the length of confinement or parole after the end of the intervening term, but only during that term, a delay in the hearing did prolong total release from custody and adversely affected a liberty interest. Wolff v. McDonell, 418 U.S. 539 (1974).

The Government next claims that appellant had no liberty interest in parole from the New Jersey incarceration, and furthermore that he was not prejudiced by the presence of the detainer because he was in fact released on parole from his New Jersey sentence. What the Government does not take into account is that appellant's parole release date, which was 18 months after his eligibility date, may have been delayed by the presence of the detainer. Such a delay postponed appellant's return to federal custody and re-commencement of the federal sentence, and prolonged the total period of custody

on parole. Since parole release is a protected interest (see Holup v. Gates, Doc. No. 76-2013, slip op. 5881 (2d Cir., October 20, 1976); Haymes v. Regan, 525 F.2d 540 (2d Cir. 1975); Johnson v. Chairman of New York State Board of Parole, 500 F.2d 925 (2d Cir. 1974)),* the unresolved detainer may have prejudiced that interest by causing the delay in release on New Jersey parole, a situation to be presumed unless the Government shows no prejudice. See Stephens v. Cox, 449 F.2d 657 (7th Cir. 1971).

In contrast with Moody, where the release on parole from the second crime and revocation of parole on the first crime are to be decided by the same parole authority, and Moody could thus protect his interest in release by seeking disposition of the revocation detainer, appellant's protected interest in parole release was adversely affected since he had no opportunity for a hearing before the authority controlling parole revocation.

Quoting from footnote 9 of the opinion in Moody, the Government also argues that appellant had no liberty interest in the rehabilitation programs in the state institution. The Government ignores the authorities cited in appellant's supplementary brief that permit an inmate in a New Jersey institution to sue for arbitrary denial of participation in rehabilitation programs.

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*The issue of whether parole release is a protected interest has not been resolved by the Supreme Court. See Bradford v. Weinstein, 519 F.2d 728 (4th Cir. 1972), vacated as moot, 96 Sup.Ct. 347 (1975). The most recent case to present that question was vacated and remanded for a determination as to mootness. Scott v. Kentucky Parole Board, 97 Sup.Ct. 342 (1976).

In Meachum v. Fano, 96 Sup.Ct. 2532 (1976), it was made clear that the state can, by statute, create rights which are protected. See Wolff v. McDonnell, supra, 418 U.S. 539. While in Meachum the State did not create the right to be in any particular institution, and in Moody the federal government left full discretion to control conditions of confinement to prison authorities, here New Jersey has created a right against arbitrary action by prison authorities and has limited its discretion to deny participation in rehabilitation programs. The Government also argues that appellant's liberty interest was not affected because he did not participate in the programs at the prison. It seems too obvious to have to state that this record shows that he was denied participation because of the detainer in other programs providing more and different training.

II

With sleight of hand, the Government attempts to modify the basis of Judge Knapp's denial of the petition from lack of jurisdiction to a refusal to exercise jurisdiction. Suffice it to say that the Judge held, "[W]e have no jurisdiction pursuant to 18 U.S.C. §2241...." On the authorities cited in appellant's main brief, Judge Knapp was wrong. See also Reese v. Board of Parole, 498 F.2d 698 (D.C. Cir. 1974).

Even if the court did believe that it was better that the case be decided in New Jersey, the procedure it had to follow

was to transfer the matter to that district under 28 U.S.C. §2241(d) or 28 U.S.C. §1404(a), (b), and not to dismiss it. The court did not make the transfer, and the Government did not request it.

The Government's further claim that although appellant and his custodian were in the Southern District of New York the writ should have been brought in New Jersey is duplicitous. When appellant brought his first petition in New Jersey at the time he was still in custody in New Jersey,* the Government argued that the writ should be dismissed for lack of jurisdiction.** When appellant was transferred to MCC and brought his second petition in the Southern District of New York, it was with the knowledge that the Government had asserted lack of jurisdiction in the New Jersey case, which remained undecided. It ill behooves the Government to argue now that this case should be prosecuted in New Jersey when it argued that New Jersey had no jurisdiction and when it did not seek a transfer of this case to New Jersey.***

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*The Government's assertion that appellant brought his first writ in New Jersey because he knew there was no jurisdiction in the Southern District of New York is absurd. Appellant brought the writ in New Jersey because he was in custody in New Jersey.

**The Government's answer to the petition is available.

***Appellant's transfer to MCC from the New Jersey institution would not have caused the New Jersey district court to lose jurisdiction. Smith v. Campbell, 450 F.2d 829 (9th Cir. 1971); Hudson v. Hardy, 424 F.2d 854 (D.C. Cir. 1970). However, since the petition filed in New Jersey sought a hearing during the intervening sentence, and the writ in New York sought release because no such hearing had been given, the New Jersey proceeding had no bearing on the petition in New York.

The Government next argues that there was no jurisdiction because the case was moot. Mootness is said to come about because appellant's release from state custody terminates his ability to participate in rehabilitation programs there. As an initial matter, appellant claims not only loss of rehabilitative programs, but a continuing prejudice from the detainer due to his inability to get concurrent sentences and to his postponed and lengthened term of federal custody and parole. Furthermore, although appellant is not able to participate in rehabilitation programs because of his release, the matter is not moot if his inability to participate in the programs has a continuing effect or disability. See Sibron v. New York, 392 U.S. 40 (19); In re Balley, 482 F.2d 648, 651 (D.C. Cir. 1973); Hudson v. Hardy, 424 F.2d 854 (D.C. Cir. 1970). The record of the federal parole revocation hearing establishes that the Board considered it adversely to appellant that he had not participated in an education release program -- the very program he was barred from because of the detainer. Since this factor in the record follows appellant -- and he is still on parole -- he is suffering the continuing effect of the illegal acts.

CONCLUSION

For the foregoing reasons and the reasons argued in the main and supplementary briefs for appellant, the order of the district court should be reversed and the writ granted.

Respectfully submitted,

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